Supreme Court of the United States

October Term, 1951

No. 522

JOSEPH BURSTYN, INC.,

Appellant,

vs.

LEWIS A. WILSON, Commissioner of Education of the State of New York, *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

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LEWIS A. WILSON, Commissioner of Education of the State of New York, and JOHN P. MYERS, WILLIAM J. WALLIN, WILLIAM LELAND THOMPSON, GEORGE HOPKINS BOND, W. KINGSLAND MACY, EDWARD R. EASTMAN, WELLES V. MOOT, CAROLINE WERNER GANNETT, ROGER W. STRAUS, DOMINICK F. MAURILLO, JOHN F. BROSNAN and JACOB L. HOLTZMANN, as Regents of the University of the State of New York,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLEES

Statement of the Case

This proceeding was brought under Article 78 of the New York Civil Practice Act to review the determination and order of the appellee, the Board of Regents of the University of the State of New York, rescinding and cancelling the licenses theretofore issued for the exhibition of the motion picture films "The Miracle" and "Ways of Love."

The Appellate Division of the Supreme Court of the State of New York, Third Department, unanimously confirmed the determination of appellees (R. 87). The Court of Appeals affirmed the order of confirmance (two Judges dissenting) (R. 142).

The opinion of the Appellate Division is reported in 278 App. Div. at page 253, and appears at pages 88-94 of the Record.

The prevailing, concurring and dissenting opinions of the Court of Appeals are reported in 303 N. Y. at pages 242, 262 and 264, and appear at pages 144, 158 and 159 of the Record.

The Statute

The statute under attack is Article 3, Part II (§§ 120-132) of the New York Education Law, which is reproduced as Appendix A to this Brief.

Under the statute, all motion pictures to be exhibited within the State, with exceptions hereinafter to be noted, are required to be submitted to the motion picture division of the Education Department, which must issue a license therefor "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime" (§ 122).

"Current Event" Films. Specifically excepted from the statute are "all films exclusively portraying current events or pictorial news of the day, commonly called newsreels, or excerpts from the public press", which may be exhibited without inspection and without permits or fees (§ 123, subd. 1).

Scientific and Educational Films. Permits for every such motion picture film, intended for use by the learned professions, must be issued without examination, upon the filing by the owner of a description of the film and a statement that it is not to be exhibited at any private or public place of amusement (§ 123, subd. 2).

Films for Educational, Charitable and Religious Purposes. Permits for films for these purposes, or for the instruction or welfare of an employer's employees, may be issued by the motion picture division without examination, upon the filing by the owner of a description of the film (§ 123, subd. 3).

Permits, as distinguished from the licenses, may be revoked five days after a notice in writing to the applicant, in which event the film may be submitted in the manner provided for licenses (§ 125).

Thus, the only required examination of motion pictures, under the statute, is of those which are to be shown for entertainment purposes in public theatres where admission fees are to be charged.

The determination of the Board of Regents, in respect to the denial of a license, must be based upon evidence sufficient to satisfy a reasonable need, must not be arbitrary or capricious, and is subject at all times to review by the courts under Article 78 of the State's Civil Practice Act.

The Issue

Succinctly stated the questions attempted to be raised by appellant's specifications of error are:

1. Is "The Miracle" sacrilegious?
2. Does the statute impose a constitutional restraint on freedom of expression and communication?

3. Is the statute so vague as to deprive appellant of property without due process of law?
4. Does the statute violate the constitutional guaranty of separation of church and state or prevent the free exercise of religion?

Upon the first question, it is thought that this court will accept the finding of the Board of Regents and of the state courts that the picture is in fact sacrilegious.

Underlying the questions which appellant seeks to raise are the primary points that appellant may not be heard to question the validity of the statute, since (1) it has sought and obtained benefits under it and (2) there was no prior restraint as to appellant and the showing of "The Miracle."

The Facts

On March 2, 1949, the motion picture division of the State Education Department issued a license to Lopert Films, Inc., for a motion picture with Italian dialogue entitled "Il Miracolo" (R. 27). To the knowledge of appellees, this picture was never exhibited pursuant to this license. On November 30, 1950, the motion picture division of the State Education Department issued a license to appellant, Joseph Burstyn, Inc., for a motion picture film trilogy entitled "Ways of Love", which said trilogy included the motion picture entitled "The Miracle" (R. 27). The reviews in both instances were made in the usual routine by certain of the reviewers.

Closely following the initial exhibition of the picture "Ways of Love", the Education Department of the State of New York and the Board of Regents of the University of the State of New York were in receipt of many com-

munications concerning the public exhibition of "The Miracle" (R. 48, 86). These communications indicated that there was a strong feeling by the public that the film was sacrilegious (R. 48, 86). Soon thereafter the Commissioner of Licenses of the City of New York notified the Paris Theater Corporation, where the motion picture was being exhibited, that if the theater continued to exhibit "The Miracle", steps would be taken in regard to its theater license (R. 49). The Commissioner gave further notice to Joseph Burstyn, Inc., the distributor of "The Miracle", that similar action would be taken in regard to any other theater which exhibited the film. Upon the continued exhibition of the film, the Commissioner suspended the license of the Paris Theater Corporation. The Commissioner stated that he took this action because he found the picture to be "a blasphemous affront to a great many of the citizens of our city" (*Burstyn* v. *McCaffrey*, 198 Misc. 884, 885). Thereupon the appellant herein commenced an action seeking to enjoin the Commissioner of Licenses from taking such action and attacked the authority of the Commissioner to do so. The Supreme Court of the State of New York, at a Special Term held in and for the County of New York, granted the injunction prayed for by petitioner in that action, (the appellant here) upon the ground that the right to determine whether a motion picture is sacrilegious "is vested solely and exclusively in the Education Department of the State. * * * This power negatives the existence of co-equal powers in any municipal officer * * *". The Justice further stated "* * * Any individual can seek to have the Board of Regents revoke its permit * * *". (*Burstyn* v. *McCaffrey, (supra)*).

Meantime various organizations maintained picket lines outside of the Paris Theater where "The Miracle" was

being exhibited (R. 49), and the Chancellor of the Board of Regents, recognizing that the public exhibition of "The Miracle" had become a matter of public controversy, placed the matter on the agenda of the January 1951 meeting of the Board (R. 25), and requested three members of the Board to view the film in question and be in a position to give their colleagues upon the Board their views. This committee viewed the film, described the picture to the entire Board of Regents, and stated that in their unanimous judgment "The Miracle" was sacrilegious (R. 26).

In view of the rising storm of protest and the report of this committee, the Board of Regents thereupon directed that the holders of the licenses be required to show cause on the 30th day of January, 1951, at the Association of the Bar, in the City of New York, why the licenses should not be rescinded and cancelled on the ground that the picture is sacrilegious (R. 27).

In addition to the licensees, opportunity was afforded to any organizations or persons, who cared to do so, to submit briefs, and many took this opportunity to file letters and briefs with the Board of Regents setting forth their views on the matter (R. 26).

Lopert Films, Inc., the holder of the first license, did not appear at the hearing but later telegraphed that it had assigned its interests in "The Miracle" (R. 49).

Joseph Burstyn, Inc., the holder of the later license for "Ways of Love", which included "The Miracle" appeared specially at the hearing and challenged the jurisdiction of the Board of Regents and of the committee, alleging that they had no power or authority to proceed. No attempt was made to meet the merits of the controversy, and af-

ter stating their grounds for challenging the jurisdiction, appellant withdrew from further participation in the hearing (R. 30, 39 *et seq.*, 49).

Counsel for Joseph Burstyn individually, who, it is alleged, is the sole stockholder of Joseph Burstyn, Inc., the appellant herein, submitted a long affidavit and voluminous exhibits in an attempt to sustain his contention that any action on the part of the Board of Regents with respect to the license for the motion picture film "The Miracle" was unauthorized by law and "an unauthorized restriction of the right of free expression and communication" (R. 42).

The greatest portion of the briefs submitted at the hearing by other organizations and persons urged that the licenses be revoked. The others confined their arguments to the desirability of censorship of motion picture films, the validity or desirability of the standards of exclusion set forth in the law, and some challenged the constitutionality of the statute involved (R. 50).

The committee, in its report dated February 15, 1951, recommended that the members of the Board of Regents, as a committee of the whole, view the motion picture in question (R. 54).

On February 15, 1951, the Board of Regents, as a committee of the whole, at a private showing, viewed the film. At its regular meeting the following day, the Board of Regents considered the report of the committee, the affidavits, briefs, and other documents, and after full discussion and due deliberation, unanimously found that "The Miracle" was sacrilegious and not entitled to be licensed under the provisions of Section 122 of the Education Law. It was voted that the license issued to Lopert

Films, Inc., on March 1, 1949, for "Il Miracolo", and the license issued to Joseph Burstyn, Inc., for the trilogy "Ways of Love", which included "The Miracle", be cancelled and rescinded. It was further voted that upon application to the Motion Picture Division a license would be granted for so much of the trilogy "Ways of Love" as did not include "The Miracle" (R. 54-56). Thereafter, and on the same day, this proceeding was commenced (R. 1-2).

The Decisions Below

Of the Court of Appeals

The Court of Appeals, construing the statute and after its members had viewed the picture, reached the following conclusions:

1. That the meaning of the word "sacrilegious" is clear and provides a sufficiently definite standard (R. 151),
2. That the picture not only encroaches upon the sacred relationship of Christ, His Mother, Mary, and Joseph, and the Biblical presentation thereof in respect to the birth of Christ, but utterly destroys it, associating it, as the Regents found, "with drunkenness, seduction, mockery and lewdness", and in the language of the script itself, "with passionate attachment, sexual passion and gratification", as a way of love (R. 153),
3. That the statute does not violate the provisions of the First Amendment relating to religious freedom (R. 156) because religious presentations, as well as educational and scientific films, are exempt from licensure and no one is prevented by the statute from propagating his own religious views by means of motion pictures (R. 154); because the Regents are not required to form religious judgments in order to

determine whether a film is sacrilegious, the standard applied being that no religion shall be treated with contempt, mockery, scorn and ridicule by those engaged in selling entertainment by way of motion pictures; because the statute is directed to the promotion of the public welfare, morals, peace and order and the fact that some benefit may incidentally accrue to religion is not sufficient to render the statute unconstitutional (R. 155). It said that the denial of the right of the government to interfere to protect religious beliefs from private or commercial attacks or persecution is a denial of its power to keep peace and of the right of the free exercise of religion (R. 155).

On the subject of freedom of expression, the Court held that, since the licensee here sought and obtained benefits under the statute and seeks to retain the license granted, it may not argue that the statute is unconstitutional *in toto* as a prior restraint on the right of free speech, but nevertheless disposing of the argument on the merits, held that motion pictures are primarily a form of entertainment and not in the same category as the press as vehicles of thought (R. 156).

Excerpts from the Court's opinion will be set forth under the appropriate point headings *infra*.

Of the Appellate Division

The five justices of the Appellate Division had also viewed the picture. The presiding justice, writing for the unanimous Court, described the film in the following language (R. 88):

"The picture, produced in Italy, depicts a demented peasant girl tending a herd of goats on mountainside.

A bearded stranger appears, garbed in a dress reminiscent of Biblical times. She imagines him to be St. Joseph, and that he has come to take her to heaven. While she babbles about this life says nothing, but plies her with wine, and the implication is left that he seduces her. Later, when her pregnancy becomes known to the villagers, they mock her and place a basin on her head in imitation of a halo. She exclaims at one point as to her pregnancy, 'It's the grace of God.' She leaves the village to take refuge in a cave, and finally gives birth to a child in the basement of a church which stands on a high hill.

"According to the English dialogue, in her babbling to the bearded stranger, she makes these statements: 'I'm not well * * * And taking a loaf of bread, he broke it * * * And an Angel of the Lord appeared in his dream and said * * * Joseph, * * * Son of David * * * Have no fear to take Mary as your bride * * * for what has been conceived here * * * St. Joseph * * * Cast aside my body and my soul * * * I'd feel so happy without this weight * * * St. Joseph has come to me * * * What Heaven * * * Heaven on earth * * * The mad woman has received grace.'"

After defining the term "sacrilege" as having the modern meaning of "the violation or profanation of sacred things" and stating that the Legislature obviously used the term in its widest sense as applied to all recognized religions (R. 90-91), the Court concluded (R. 91-92):

"A view of the picture in question would convince any reasonable mind that it was conceived and produced purely as an entertainment spectacle, and not as a vehicle for inquiry or discussion as to the merits of any religious dogma. The statute does not muzzle either free speech or a free press. All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom. It should be added in connection with this point that news films, scientific and educational films, are expressly exempted from censorship."

Summary of Argument

I. The licensing statute imposes no unconstitutional restraint on freedom of expression or communication. This Court so held in the *Mutual Film* cases (236 U. S. 230, 248). The authority of those cases has in no way been impaired, but on the contrary their rationale has been followed in numerous decisions of this and other courts.

II. The New York statute is more narrowly drawn than the statutes held constitutional in the *Mutual Film* cases in that it expressly exempts current event films from its provisions and provides for the issuance of permits for films intended solely for educational, charitable, religious and similar purposes without inspection.

III. The production and exhibition of the entertainment type of motion pictures is big business—show business—as the industry itself recognizes. The need for regulation is, if anything, greater today than at the time of the decisions in the *Mutual Film* cases. The constitutional guaranties of the First Amendment are not applicable to them in precisely the same way as to speech and the press.

IV. Preventive measures, as distinguished from punishment for abuse of constitutional freedoms, is the only effective way of dealing with motion pictures, but in the instant case there has been no previous restraint or prior censorship.

V. The constitutional guaranty of freedom of religion does not embrace the right to lampoon and vilify all religion or any religion. The proscription of motion pictures of that sort does not entail participation in religious affairs, and is well within the State's police power to promote the public welfare, morals, public peace and order. Gratuitous

insult to recognize religious beliefs by means of commercial pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose.

VI. The term "sacrilegious" is not vague or indefinite. The Court of Appeals construed it as "the act of violating or profaning anything sacred". That is its meaning in ordinary speech.

VII. Appellant, having accepted benefits under the statute, and there having been no prior restraint in this case, is without standing to contest the validity of the statute.

I

The provisions of the New York law as to the licensing of motion pictures and the circumstances when they shall not be licensed are constitutional under direct precedent. The law offends no right guaranteed by the First Amendment as this Court has interpreted that amendment.

A

EVERY CONTENTION PRESENTED BY APPELLANT HERE WAS CONSIDERED AND REJECTED BY THIS COURT IN THE MUTUAL FILM CASES, 236 U. S. 230; 248.

The arguments in opposition to the statute in the *Mutual* case were very like the arguments appellant is making here (Br., p. 10), viz.: that motion pictures express ideas and opinions and are educational, and therefore are to be accorded freedom of speech and press in precisely the same way as a speech or newspaper article.

The Court's answer in the *Mutual* case to those arguments, answers the similar arguments here. Said the Court (pp. 241-242):

> "We may concede the praise [of the useful purposes of movies]. * * * No exhibition, therefore, or 'campaign' of complainant will be prevented if its pictures have those qualities. Therefore, however missionary of opinion films are or may become, however educational or entertaining, there is no impediment to their value or effect in the Ohio statute."

But, said the Court,

> "* * * they may be used for evil, and against that possibility the statute was enacted. Their power of amusement and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences. And not only the State of Ohio but other States have considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty."

As in the present case (Br., p. 10), the argument was made in the *Mutual* case for subsequent responsibility for abuse rather than prior licensing (236 U. S. at p. 242).

The Court's reply to that argument was that while motion pictures "may be mediums of thought," they were not the same thing as the speech and writing to which the First Amendment guaranties apply and therefore not similarly protected (pp. 243-244). Said the Court:

> "We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are

advertised on the bill-boards of our cities and towns and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.

"The judicial sense supporting the common sense of the country is against the contention."

Moreover, the Court added (pp. 244-245):

"It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the State of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government."

Upon these principles was the constitutionality of the Ohio law upheld in the *Mutual* case. This Court has reenunciated each one of these principles in recent years in decisions cited *post*. Neither the case itself, therefore, nor its rationale has been abandoned or its authority diminished.

Appellant suggests (Br., p. 26), as a ground for considering the *Mutual* case as impaired in validity today, that in 1915 First Amendment guaranties were not considered as applicable to the states. Whether or not that is so is of no moment insofar as the *Mutual* case is concerned, for

freedom of speech and publication were guaranteed by the Ohio Constitution (236 U. S. at p. 241), and the validity of the statute was tested by the Court on the basis of whether it violated those guaranties (id.).

The New York law is substantially narrower than the statute sustained in Mutual Film Corp. v. Ohio.

The Ohio statute upheld in the *Mutual* case *(supra)*, 236 U. S. 230 provided (as quoted and described at page 240 of the opinion):

> "Section 4. 'Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board.' The films are required to be stamped or designated in a proper manner."

The New York statute here under consideration does not cover current event films (which may be exhibited without inspection, permit or fees [Education Law § 123(1), quoted in full in Appendix]), or scientific and educational films, and films intended solely for educational, charitable or religious purposes, or to be exhibited by any employer for the instruction or welfare of his employees (Education Law § 123 [2 and 3], quoted in full in Appendix). For the last a permit is to be issued without inspection upon the filing of an application which shall include a description of the film. Permits for scientific and educational films are to be issued upon filing of a description and a statement that they are not to be exhibited at any private or public place of amusement.

Moreover, the New York statute (Education Law § 122) specifically limits the power of refusal of licensure to certain categories of objectional films, to those which are

"obscene, indecent, immoral, inhuman, sacrilegious, or * * * of such a character that * * * exhibition would tend to corrupt morals or incite to crime."

"Unless" a film falls into these categories, the film *must* be licensed as a matter of law.

The determination that a film falls into any of the proscribed categories is fully subject to review, first within the Department of Education and thereafter in the Courts. This litigation has been such a review.

It is submitted that if the Ohio statute which gave much broader powers to the Board was declared to be fully within the Constitution, that the decisions of this Court in the *Mutual* case apply with much greater force to the New York statute, which fully safeguards the rights of the industry and gives full rein to those films which are not shown for amusement at a profit but for scientific, religious or educational purposes, i. e., as media of thought and opinion, as well as to those which are comparable to the press—current event films.

The Mutual case has not been overruled but on the contrary expressly followed.

Appellant recognizes that the *Mutual* case* forecloses any contention that the New York statute is unconstitutional. Therefore, it argues that the decision has "in effect" been overruled (Br., pp. 10, 25).

On the contrary. In 1949, Mr. Justice Frankfurter in *Kovacs* v. *Cooper* said as directly as could be said (336 U. S. 77, 96):

"movies have been constitutionally regulated,"

citing for that declaration the *Mutual* case.

* The decision was unanimous. Mr. Justice Holmes was a member of that Court.

In October 1950 (340 U. S. 853), the present membership of this Court denied certiorari in *RD-DR Corporation* v. *Smith* (Mr. Justice Douglas not being in agreement with that denial). The primary argument that had been made in the United States Court of Appeals, in support of the Atlanta ordinance involved in that case, was the *Mutual* case, and the Court of Appeals (183 F. (2d) 562) based its decision thereon, saying (p. 565):

> "The decision has been on the books for years, not only unchanged but uncriticized. * * * Since its writing, it has been quoted from and followed without varying in decisions without number."

In 1938, this Court rendered the following *per curiam* opinion in *Eureka Productions, Inc.* v. *Lehman, Governor, et al.*, 304 U. S. 541:

> "The motion of the appellees to affirm is granted and the judgment is affirmed. *Mutual Film Corp.* v. *Ohio Industrial Comm'n*, 236 U. S. 230, 240, 241; *Mutual Film Corp.* v. *Kansas*, 236 U. S. 248, 258."

A three-judge Federal District court had upheld New York's denial—under the statute here involved—of a license for the motion picture "Ecstacy" (17 F. Supp. 259).

There would be no purpose in reproducing here the columns of cases from Shepards' Citations in which the *Mutual* case has been cited. They attest to the fact that it has not in any sense been overruled but has continued to stand as authority, and the proposition it established has continued to be regarded as firmly established; that this Court, the highest courts of many of the states, the federal courts below the level of this Court, have, beginning with the *Mutual* case and steadily and consistently following that case, completely disposed of the issue appellant is raising here, and appellant places its hope now in this Court re-

versing itself and the long line of decisions of other state and federal courts, in order that it might agree with appellant's contentions.

The rationale of the Mutual opinion is completely valid today.

Appellant (Br. p. 26) says that the basis of the *Mutual* decision no longer has merit; that motion pictures were stated in the *Mutual* case not to be instruments for the publication of ideas "because they were 'a business pure and simple' mere spectacles intended primarily for entertainment."

What the Court said precisely was (p. 244):

> "It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion."

No part of this has suffered in the decisions appellant cites at pp. 26-28 of the brief. It is entirely true today, reaffirmed in decisions of this Court cited *infra*.

Every human utterance, vocal or physical, is the expression of a thought or idea. It is true of a musical composition, of a ballet and of pantomime. But that does not make these the equivalent of speech or press so as to be entitled to the First Amendment guaranties in the same way (cases *infra*). Nor are movies, although they too express ideas. The New York law here before the Court does not give any power over the "ideas" that movies express (statute set forth *supra*). It is only over the *manner* in which any ideas are expressed in an entertainment film if the manner is

Obscene
Indecent
Immoral

Inhuman
Sacrilegious, or
Would tend to corrupt morals
or incite to crime.

Appellant's brief (p. 13) lists a number of recent or current motion pictures dealing with social and political problems. Bearing out that the New York law does not seek to assert any power over the "ideas" in motion pictures is the fact that every one of these was licensed and shown in New York without any question.

It is not a question, therefore, of whether entertainment is entitled to protection of constitutional guaranties. It is the entertainment feature of movies that presents the possibility of there entering into a movie the obscene, indecent, sacrilegious, and it is that to which the New York law is directed.

Appellant argues that the improvement in motion picture technique and, as it believes, in subject matter eliminates the potential which the Court in the *Mutual* case recognized. Appellant neglects to recall that the Court in the *Mutual* case also recognized the presence of value in motion pictures. Appellant treats the word "spectacle" used in the *Mutual* opinion as referring to something crude. It is more probable that the Court employed the word "spectacle" to mean something exhibited for entertainment, in fact, impressive entertainment. In any event, the Court of Appeals opinion very aptly replied to appellant's argument as to the effect of the advance in motion picture technique. Judge Froessel's opinion (R. 157; 303 N. Y. 261-262) noted that the development was foreseen in the *Mutual* cases (referring to p. 242 of that opinion) and added:

> "It should be emphasized, however, that technical developments which increase the force of impact of motion pictures simply render the problem more acute. * * * it is precisely that [greater] ability [of transmission] which multiplies the dangers already inherent in the particular form of expression."

"The constitutional concepts of freedom of speech and press" (Br., p. 26) expressed in other fields by this Court in recent years do not diverge from the principles of the *Mutual* decision *(infra,* "B" of this point). Appellant relies upon the statement of Mr. Justice Douglas in *United States* v. *Paramount Pictures,* 334 U. S. 131, 166, that motion pictures are included in the press whose freedom is guaranteed by the First Amendment. Appellant (Br., p. 12) says frankly that this statement is dictum, which indeed Mr. Justice Douglas said it was (334 U. S. at p. 166). Necessarily, therefore, there was no analysis in the opinion to what extent that protection would be carried. It is not carried to that which makes a motion picture ineligible for license in New York. Not in any medium *(infra,* "B" of this point).

In fact, Mr. Justice Douglas in an address in Los Angeles on February 18, 1949, before the Associated Friends of Occidental College, said:

> "We can let man express himself in art and the letters. He is restricted only by the laws of libel and *obscenity.*" (emphasis supplied)

The Motion Picture Industry—a principal part of the "large-scale business" of entertainment. The particular situations this presents and the extent of constitutional protection thereof.

The motion picture industry hardly regards itself as an educational institution. It is in show business. For profit. Today as in 1915.

In a foreword to the November 1947 issue of "The Annals of The American Academy of Political and Social Science," devoted to "The Motion Picture Industry," Gordon S. Watkins, editor of The Annals, pointed out (p. vii):

> "In modern civilized societies the provision of entertainment has become a large-scale business. In that business the motion picture industry plays a principal role, since * * * its primary function is to furnish entertainment."

In an article in that issue on "The Rise and Place of the Motion Picture," Terry Ramsaye,* editor of Motion Picture Herald, and otherwise engaged in production and promotions in the motion picture industry, wrote (p. 11):

> "Its [motion picture] costs are such that it can be generally supported only by the massed buying power of majorities. * * * The people who pay for the pictures want to see them as emotional experience, not as subjects of study."

Again in the same issue of The Annals (p. 55), Donald M. Nelson, president of the Society of Independent Motion Picture Producers, said:

> "Now that the American people are paying over a billion dollars a year to live vicariously in the make-believe world of the cinema, there can be no doubt that 'there's no business like show business' to either Wall Street or Main Street."

Martin Quigley, publisher and editor of motion picture publications and lecturer on social and industrial aspects of motion pictures, said in the same issue of The Annals (pp. 65, 66, 68):

> "The primary and substantially exclusive purpose of the entertainment motion picture is to entertain. * * *

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* Appellant cites Mr. Ramsaye, brief p. 28.

> "As an entertainment medium the motion picture is not a natural inheritor of academic responsibility. To assume that it is burdened with such responsibilities is both illogical and dangerous. * * *
>
> "* * * there are many millions of people in this country and elsewhere throughout the world who earnestly hope that motion pictures will never cease to provide, in the midst of the current conditions of stress, uncertainty, and disillusionment, the recreation, relaxation, and escape which are their popular characteristics."

This is the movies as the industry itself sees it. It is entertainment and it is business, big business. That the motion picture industry is a business is of utmost relevance in determining the extent of First Amendment protection. In *Breard* v. *Alexandria*, 341 U. S. 622 (1951), the constitutionality of an ordinance forbidding door-to-door solicitation of orders for the sale of goods was upheld against an attack that it violated freedom of speech, of the press and due process. Breard was arrested while making door-to-door solicitation of subscriptions for nationally known magazines. As to the contention that the ordinance was an abridgment of freedom of speech and the press, Mr. Justice Reed's opinion said (pp. 641-642):

> "Only the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes. * * * Thus the argument is * * * that the distribution of periodicals through door-to-door canvassing is entitled to First Amendment protection. This kind of distribution is said to be protected because the mere fact that money is made out of the distribution does not bar the publications from First Amendment protection. We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature."

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, a case which involved the distribution of religious literature for which

a nominal price was charged, although the tracts were donated in instances, Mr. Justice Douglas pointed out that "the distinction" between a religious and purely commercial activity is at times "vital" (p. 110), referring to the curbing of distribution of leaflets which were "purely commercial" even though they had a civic appeal or "a moral platitude appended" (p. 111). "The constitutional rights," said Mr. Justice Douglas (p. 111) of those spreading their religious beliefs through the spoken and printed word "are not to be gauged by standards governing retailers or wholesalers of books." On the record in that case, said Mr. Justice Douglas, "it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture" (p. 111).

He called it "a distortion of the facts" to describe their activities as the "occupation of selling books and pamphlets."

It would be exactly the same "distortion of the facts" to regard the production and exhibition of the entertainment motion picture as educational activity rather than "commercial." The motion picture industry is a purely commercial venture, notwithstanding any civic or social ideas that some motion pictures may contain (cf. *Murdock* v. *Pennsylvania, supra,* 319 U. S. at p. 111). And that it is primarily a commercial venture does, as this Court has held so recently as the *Breard* case and in the *Murdock* case, make a very decided difference.

There is some three billion dollars invested in the United States film industry. That investment must attract a lot of business to realize a profit. And it does. Some 60,000,000* admissions a week, of people seeking entertain-

* Statistics are for the year 1950 from *International Motion Picture Almanac*, 1951.

ment. That is what, as we have seen, the industry feels it is its job to furnish. The maker of each picture in this highly competitive business, with so much at stake, seeks to attract as much as possible of those millions of weekly admissions to its own picture. Even the names of the pictures are chosen with the purpose of conveying the anticipation of an entertaining content, rather than a social message. The motion picture advertisement heralds the entertainment to be derived in one form of escapism or another. For motion pictures dealing with social and political problems, the advertisement, too, refers rarely if ever to those features of the picture, but to its entertainment aspects. To demonstrate, there is attached, as Appendix B of this Brief, reproductions of two pages of The New York Times—labeled "Amusements"—on which appear the motion picture advertisements for New York City as this brief is being written (April 3, 1952).

To make entertaining pictures the producer is ever in search for the novel, the spectacular, the sensational, the different. He will employ comedy, mimicry, mockery, exaggeration. In most cases he will refrain from the obscene, lewd, indecent or sacrilegious, but the potential of possible evil is there.

The motion picture industry itself recognizes this potential and the need for some regulation or control.** Its own Production Code (reproduced in full in "Freedom of the Movies," report by The Commission on Freedom of the Press) declares in part as follows (emphasis as it appears in the Code):

> "Motion picture producers recognize the high trust and confidence which have been placed in them by the people of the world and which have made motion pictures a universal form of entertainment.

** As in fact appellant does, e. g., Br. pp. 10, 21, 36.

"They recognize their responsibility to the public because of this trust and because entertainment and art are important influences in the life of a nation.

"Hence, though regarding motion pictures primarily as entertainment without any explicit purpose of teaching or propaganda, they know that the motion picture within its own field of entertainment may be directly responsible for spiritual or moral progress, for higher types of social life, and for much correct thinking." (p. 205)

"REASONS SUPPORTING PREAMBLE OF CODE

"1. Theatrical motion pictures, that is, pictures intended for the theatre as distinct from pictures intended for churches, schools, lecture halls, educational movements, social reform movements, etc., are primarily to be regarded as ENTERTAINMENT.

"Mankind * * * has always recognized that entertainment can be of a character either HELPFUL OR HARMFUL to the human race, * * *.

"*Hence* the MORAL IMPORTANCE of entertainment is something which has been universally recognized. It enters intimately into the lives of men and women and affects them closely; it occupies their minds and affections during leisure hours; and ultimately touches the whole of their lives. A man may be judged by his standard of entertainment as easily as by the standard of his work.

So *correct entertainment raises* the whole standard of a nation.

Wrong entertainment lowers the whole living conditions and moral ideals of a race." * * *

"2. Motion pictures are very important as ART. * * *

"Here, as in entertainment,

Art *enters intimately* into the lives of human beings. * * *

Art can be *morally evil* in its effects. This is the case clearly enough with unclean art, indecent books, suggestive drama. The effect on the lives of men and women is obvious. * * *

In the case of the motion pictures, this effect may be particularly emphasized because no art has

so quick and so widespread an appeal to the masses. It has become in an incredibly short period *the art of the multitudes.* * * *

"A. Most arts appeal to the mature. This art appeals at once *to every class*, mature, immature, developed, undeveloped, law abiding, criminal. * * * This art of the motion picture, combining as it does the two fundamental appeals of looking at a *picture* and *listening to a story*, at once reaches every class of society.

"B. By reason of the mobility of a film and the ease of picture distribution, and because of the possibility of duplicating positives in large quantities, this art *reaches places* unpenetrated by other forms of art. * * *

"D. The latitude given to film material cannot, in consequence, be as wide as the latitude given to *book material*. In addition:

a) A book describes; a film vividly presents. One presents on a cold page; the other by apparently living people.

b) A book reaches the mind through words merely; a film reaches the eyes and ears through the reproduction of actual events.

c) The reaction of a reader to a book depends largely on the keenness of the reader's imagination; the reaction to a film depends on the vividness of presentation. Hence many things which might be described or suggested in a book could not possibly be presented in a film.

"E. This is also true when comparing the film with the newspaper.

a) Newspapers present by description, films by actual presentation.

b) Newspapers are after the fact and present things as having taken place; the film gives the events in the process of enactment and with apparent reality of life."

"F. Everything possible in a *play* is not possible in a film:

a) Because of the *larger audience of the film*, and its consequential mixed character. Psychologically, the larger the audience, the lower the moral mass resistance to suggestion.

b) Because through light, enlargement of character, presentation, scenic emphasis, etc., the screen story is *brought closer* to the audience than the play.

c) The enthusiasm for and interest in the film *actors* and *actresses*, developed beyond anything of the sort in history, makes the audience largely sympathetic toward the characters they portray and the stories in which they figure. Hence the audience is more ready to confuse actor and actress and the characters they portray, and it is most receptive of the emotions and ideals presented by their favorite stars.

"G. *Small communities*, remote from sophistication and from the hardening process which often takes place in the ethical and moral standards of groups in larger cities, are easily and readily reached by any sort of film.

"H. The grandeur of mass settings, large action, spectacular features, etc., affects and arouses more intensely the emotional side of the audience.

"In general, the mobility, popularity, accessibility, emotional appeal, vividness, straightforward presentation of fact in the film make for more intimate contact with a larger audience and for greater emotional appeal" (pp. 212, 213, 214, 215).

B

THE CONSTITUTIONAL GUARANTIES OF FREEDOM OF SPEECH AND PRESS DO NOT PROTECT OR SANCTION THAT FOR WHICH THE NEW YORK STATUTE DENIES A LICENSE TO MOTION PICTURES.

In the next point will be discussed the denial of a license on the ground that the picture is sacrilegous, the ground upon which the license for "The Miracle" was revoked. The instant point deals with the First Amendment guaranties in respect to the other grounds for denial of motion picture licenses in New York.

Laws outlawing the obscene, lewd and indecent are commonplace.

> The obscene, lewd or indecent may not be sent through the mails in book, pamphlet, picture, *motion picture film*, paper, writing or print, phonograph recording or electrical transcription (18 U. S. C. A. § 1462, 1461, 1463; *United States* v. *Alpers*, 338 U. S. 680; *Rosen* v. *United States*, 161 U. S. 29).
>
> They may not be spoken on radio (18 U. S. C. A. § 1464; 47 U. S. C. A. § 303 [D]; *Trinity Methodist Church, South* v. *Federal Radio Comm.*, 62 F. (2d) 850, cert. den. 284 U. S. 685).
>
> Obscene films, books, pictures, etc. may not be imported into the United States under federal law (19 U. S. C. A. § 1305; 18 U. S. C. A. § 1462). In addition to New York State, there are at least six state laws and some 200 local laws and ordinances designed to prevent the showing of obscene and indecent motion pictures.*

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* Eric Johnston, President of the Motion Picture Association of America, in an address October 24, 1950, referred to in 19 George Washington Law Review at p. 312; International Motion Picture Almanac, 1948-9, p. 735. Both of these authorities have given the figures as 200 cities or more, not 50 as appellant says (Br. p. 20).

There are federal and state laws, local laws and ordinances in various fields imposing restraint upon public exhibition or dissemination of the obscene and indecent, e. g. New York Penal Law § 1141, *infra*.

Mr. Justice Murphy in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, a unanimous opinion, among the concurring Justices being Mr. Justice Black, Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Jackson, said (pp. 571-572):

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell* v. *Connecticut*, 310 U. S. 296, 309-310" (emphasis supplied).

Earlier, in *Near* v. *Minnesota*, 283 U. S. 697, Mr. Justice Hughes said (p. 716):

> "The primary requirements of decency may be enforced against obscene publications."

In *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, Mr. Justice Douglas said (p. 158):

> "The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted."

In *Winters v. New York*, 333 U. S. 507, Mr. Justice Reed said (p. 510) that magazines, although "entitled to the protection of free speech" "are equally subject to control if they are lewd, indecent, obscene or profane."

As the authoritative Cooley on *Constitutional Limitations* stated the rule (p. 886):

> "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense * * *."

So Professor Frank Thayer in the 1950 edition of his "Legal Control of the Press" states the law to be (p. 277):

> "When licentiousness begins freedom of the press ends to that extent, for liberty is not license; filth, though it may be tawdrily dressed up or concealed, remains filth whatever its form of expression or time of publication. That which is obscene connotes filth, impurity, indecency, and immorality."

Appellant (Br., pp. 15, 22, 24, 26) has cited Professor Zechariah Chafee. Professor Chafee has set forth some views upon obscenity which appellant has not cited. For example, says Chafee in "Free Speech in the United States" at p. 150:*

> "profanity and indecent talk and pictures * * * which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social

* The same thought is repeated in Professor Chafee's *Government and Mass Communications* (p. 200), which is the report of the Commission on Freedom of the Press.

> interests in order, morality, the training of the young, and peace of mind of those who hear and see. Words of this type offer little opportunity for the usual process of counter-argument. The harm is done as soon as they are communicated, or is liable to follow almost immediately in the form of retaliatory violence."

That the constitutional protection of freedom of speech and press do not cover such words is, the author said, "too well recognized to question their constitutionality" (p. 149). He noted the "immediate consequences" of "profanity and indecent talk and pictures" "to the five senses" (p. 150).

In "Government and Mass Communications" he says of obscenity, very simply (p. 215):

> "There must be some limit. A point is bound to be reached at which the court's stomach will turn."

This, when he is speaking of books, not the movies which augment the problem so much as to make it not merely a greater one but so much greater as to be an altogether different problem in kind* *(infra,* cases).

In the first chapter of "Government and Mass Communications," *supra,* Professor Chafee says (pp. 5-6):

> "* * * we see no prospect that the community will cease thinking that some forms of expression are so bad that they ought to be stopped. Take obscenity, for example. We have to take account of the commercialization of animal appetites by men who are eager to amass large sums by supplying pornographic post cards to school children. We cannot protect the public by letting producers produce. It was objected that the market for obscenity depends on taboos in our culture and will vanish with these taboos, but there seems to be little chance of this happening while the animality of mankind is imperfectly blended with a

* "Nothing is easier than not to read a book," Christopher Morley, New York Times Book Review, March 16, 1952, reviewing John Masefield's *So Long To Learn.*

high degree of civilization. The market does change from time to time as community standards change; but a market always remains. And hence the community will be strongly impelled to regulate the market.

"Thus the Commission does not regard freedom of the press as an absolute, but as one of the most important ideals of society which has to be balanced against other ideals such as the sound training of youth. The complete removal of limitations on mass communicaitons, is, in our opinion, neither probable nor desirable."

The Commission on Freedom of the Press also published a separate work on "Freedom of the Movies", *supra*. At page 172 of that publication, speaking of "The Need for Some Controls" of motion pictures, the Commission declares (p. 172):

"Freedom, on the other hand, is not synonymous with complete lack of regulation. And a free screen does not include obscenity, indecency, lying, or fraud, either in principle or in constitutional practice."

Thus the decisions of this Court and the most liberal students in this field agree that even the speaker and the newspaper is not free to utter the obscene and the lewd.

This principle is not a contraction of the First Amendment's guaranties, but the exclusion from it of that which it was never intended to encompass. As Justice Frankfurter said in his concurring opinion in *Dennis* v. *United States*, 341 U. S. 494, 523:

"The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. Not what words did Madison and Hamilton use, but what was it in their minds which they conveyed?"

What these words conveyed as written into the Constitution was the yearning of men, who had known tyranny,

to be free to govern themselves, to dispute and if need be to censure those who govern them and the measures which they employed to govern; to express their own views of what was best. Therefore, it is not extraordinary and has perforce followed that "free speech is subject to prohibition of those abuses of expression which a civilized society may forbid" (*Dennis* v. *United States, supra*, at p. 523; *Chaplinsky* v. *New Hampshire, supra*, 315 U. S. at pp. 571-2).

As Mr. Justice Hughes said in *Near* v. *Minnesota, supra*, 283 U. S. 697, 708 (quoted in *Carpenters Union* v. *Ritter's Cafe*, 315 U. S. 722, 726);

> "Whenever state action is challenged as a denial of 'liberty,' the question always is whether the state has violated 'the essential attributes of that liberty.'"

So undoubted a libertarian as Alexander Meikeljohn in his "Free Speech and Its Relation to Government" (1948) has said (p. 104):

> "The First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage."

By the same token it does not guarantee men the right to portray for the sake of profit anything and everything, however hurtful of the public welfare, serenity, and social order, however obscene and sacrilegious. As Professor Meikeljohn went on to say, the First Amendment

> "intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare."

The phrases "freedom of speech" and "freedom of the press" are "not a substitute for the weighing of values" (*Dennis* v. *United States, supra*, at p. 543). Back of the guaranties are faith in the power of appeal to reason (*Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 293).

But the obscene, the profane, the sacrilegious (particularly as portrayed in motion pictures, *infra*, pp. 45 *et seq.*) do not permit of counterargument (*Chafee, Freedom of Speech, supra*, p. 150; *Chafee, Government and Mass Communications, supra*, p. 200). As Mr. Justice Holmes said (*Frohwerk* v. *United States*, 249 U. S. 204, 206):

> "We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

We also venture to believe that neither Hamilton nor Madison ever supposed that to regulate the exhibition of motion pictures so as to prevent the exhibition of the obscene, the indecent, the lewd, the sacrilegious, would be an unconstitutional interference with free speech. The constitutional guaranties do not grant "immunity" (*Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 495, Mr. Justice Black) to such utterances, which are generically lawless and immoral; which society generally so regards and has so declared in common and statute law.

The motion picture is not the equivalent of communication "by tongue or pen." In the application of the First Amendment, the vehicle of communication is a governing factor.

Not only does the New York law as to the licensing of motion pictures reach only that which is not protected in any form of speech or writing, but mass communications, such as motion pictures, this Court has said many times in recent years, are not the equivalent in law of speech and writing insofar as the First Amendment is concerned.

Appellant's topical heading at page 11 of its brief (also argument p. 10) is the very kind of argument which Mr.

Justice Frankfurter said in *Kovacs* v. *Cooper, supra,* 336 U. S. 77, 96, misses the problem:

> "Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas. It is argued that the Constitution protects freedom of speech; freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; *ergo* that form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories. The various forms of modern so-called 'mass communications' raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. Cf. *Associated Press* v. *United States,* 326 U. S. 1. Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated *Mutual Film Corporation* v. *Industrial Commission,* 236 U. S. 230."

In the same case, Mr. Justice Jackson said (p. 97):

> "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself * * *."

See also *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 226-227.

The principle was stated potently in Mr. Justice Frankfurter's opinion in *Hughes* v. *Superior Court,* 339 U. S. 460, 464, 465, 466, 469:

> "* * * while picketing is a mode of communication it is inseparably something more and different. * * * Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other

> modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. * * * It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. * * *
>
> "The constitutional boundary line between the competing interests of society involved in the use of picketing cannot be established by general phrases. * * *
>
> "* * * Generalizations are treacherous in the application of large constitutional concepts."

See also *Teamsters Union* v. *Hanke*, 339 U. S. 470, at p. 474, decided on the same day (May 8, 1950) as the *Hughes* case, and Mr. Justice Minton in yet another opinion rendered that day, *Building Service Union* v. *Gazzam*, 339 U. S. 532, 536-7.

Appellant bows, of course, (Br., p. 19) to the fact that this Court holds that motion pictures

> "raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison" (*Kovacs* v. *Cooper*, 336 U. S. 77, at p. 96).

What appellant then (pp. 20-25) is asking this Court to do is to "revise" (cf. *Drivers Union* v. *Meadowmoor Co.*, *supra*, 312 U. S. at p. 296), the State's judgment that there are such evils in the portrayal in motion pictures of the obscene, indecent, sacrilegious, that the State regards it necessary to protection of "the social * * * welfare" of the community, that it guard against their dissemination. But into a state's judgment of what it regards as necessary "to protect the social * * * welfare" of the community this Court will not "intrude" (*Drivers Union* v. *Meadowmoor Co.*, *supra*, 312 U. S. 287, 299), for to do so would be to deny "the exercise locally of the sovereign power of the State" where there is "reasonable basis for legislation" (*Breard*

v. *Alexandria, supra,* 341 U. S. 622, 640). As Mr. Justice Reed's opinion in that case went on to say:

> "Changing living conditions or variations in the experiences or habits of different communities may well call for different legislative regulations as to methods and manners of doing business."

To the same effect is Mr. Justice Minton's opinion in *Building Service Union* v. *Gazzam, supra,* 339 U. S. 532 at pages 537-538; *Carpenters Union* v. *Ritter's Cafe, supra,* 315 U. S. 722, 725-726; *Sterling* v. *Constantin,* 287 U. S. 378, 398; *Crowley* v. *Christensen,* 137 U. S. 86, 89-90.

"Due recognition of the powers belonging to the states" as well as "zealous regard for the guarantees of the Bill of Rights" are equally this Court's concern when issues projecting both are before it *(Drivers Union* v. *Meadowmoor Co., supra,* at pp. 296-297).

A state's judgment in this sphere "embracing as such a judgment does * * * a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect" *(Teamsters Union* v. *Hanke, supra,* 339 U. S. 470, 474-475).

"That other states have chosen a different path in such a situation" [which fact appellant seeks to translate into an argument, Br., p. 20] "may indicate a difference of social view but that is in the realm of the wisdom of legislation with which the courts are not concerned" *(Drivers Union* v. *Meadowmoor Co., supra,* 312 U. S. at pp. 296-297).

As we have reviewed *supra,* courts, writers, federal, state and local laws, deem it for the public and social business order and welfare, that the dissemination of obscene, lewd and sacrilegious matter be curbed. Since early in the advent of the motion picture to the present, this policy has

existed as to motion pictures. There are the two federal laws, seven state laws, and local laws in some two hundred cities, all adopted in the belief and desire of the people that motion pictures should be controlled in these respects.

This adoption of similar requirements by the federal government, some states and many cities, "evidences a deep seated conviction both as to the presence of the evil and as to the means adapted to check it" (*West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; see also *Teamsters Union* v. *Hanke, supra*, 339 U. S. 470; *Building Service Union* v. *Gazzam, supra*, 339 U. S. 532).

Appellant (Br., pp. 20-24) tries to measure laws such as these by a "danger" test. Danger in the sense of peril has no application to such laws. The test is, as was stated by Mr. Justice Reed in *Breard* v. *Alexandria, supra*, 341 U. S. 622, 640-641, whether there is a reasonable basis for the legislation "to protect the social * * * welfare of a community." And as Mr. Justice Murphy said in *Chaplinsky* v. *New Hampshire, supra*, 315 U. S. at p. 572, "The lewd, obscene, the profane" "by their very utterance inflict injury."

We submit that it has been shown that there is surely a reasonable basis for the curbing of the obscene, the lewd, the sacrilegious, as evidenced by the widespread adoption of laws of many kinds, to curb the dissemination of such matter.

It must give pause to face the realization that

> "Invalidation here would mean denial of power to Congress as well as to forty-eight states" (*Teamsters Union* v. *Hanke, supra*, 339 U. S. 470, 478)

and to the hundreds of localities which have found that the well-being, serenity, peace and order of the community and its people require such control.

The Public Policy in New York State as articulated by Representatives of the Public and by the Legislators is that the New York Law is necessary.

Prior to 1934 a bill had been introduced in the New York Legislature from time to time to repeal or modify the film licensing law, but the bills had never moved beyond the introduction. In 1934 the member of the Legislature who introduced such a bill demanded that his bill receive a public hearing. The records of the Department of Education show that among the civic organizations appearing at the hearing and voicing unanimous sentiments against the repeal of the statute were the following:

Judge Jeannette Brill, Magistrate of the City of New York, representing Women's Clubs.

Dr. James Lee Ellenwood, State Secretary, State Executive Committee, Y. M. C. A.

Charles J. Tobin, representing Catholic Diocese of the City of Albany and vicinity.

Miss Beulah Bailey, State Federation of Women's Clubs, representing 500,000 members.

Mrs. Franklin Blake, President of State Congress of Parent Teachers. (New York City organization)

Mrs. R. D. Glasgow, representing New York Branch of Association of University of Women.

Dr. Arvie Eldred, Secretary, New York State Teachers Association, representing 45,000 teachers of the State of New York.

Mrs. Phillip S. Wakeley, State Chairman of Legislation, New York State Congress of Parents and Teachers, representing 73,000 members.

Rev. William Peck, representing Protestant churches of the State.

Mrs. Wellington Jones, President of Capitol District Council, Girl Scouts of Ameriea.

Rev. Dorr E. Fritts, President of Ministerial Association of Troy and vicinity, representing 85 churches.

Mrs. William C. White, Motion Picture Editor for Parent Teachers, Schenectady.

Mrs. J. Francis Purdy, Albany Parent Teachers Association.

Also opposed were the officials who had had the experience of viewing motion pictures applying for licenses, the Chairman of the original Motion Picture Commission and the Counsel to the Education Department. Only the introducer of the bill and Canon William Schaeffe Chase, President of the New York Civic League appeared in favor of the bill. Premised upon this almost unanimous opposition to the repeal of the law, the bill died in committee. From 1934 through the current 1952 session of the New York State Legislature no organization and no legislator has ever introduced a bill to repeal or modify the law now before this Court. The Motion Picture Industry itself has never sponsored or advocated repeal.

Inherent in the art and mode of exhibition of the motion picture is the potential that is the altogether reasonable basis for some control and that requires the difference in the application of constitutional guaranties.

In an opinion in *Radio Corp.* v. *United States*, 341 U. S. 412 (1951), Mr. Justice Frankfurter said (pp. 425-426):

> "It is an uncritical assumption that every form of reporting or communication is equally adaptable to every situation. Thus, there may be a mode of what is called reporting which may defeat the pursuit of justice. * * *
>
> "Man forgets at terrible cost that the environment in which an event is placed may powerfully determine its effect. Disclosure conveyed by the limitations and power of the camera does not convey the same things to the mind as disclosure made by the limitations and power of pen or voice. The range of presentation, the opportunities for distortion, the impact on reason, the effect on the looker-on as against the reader-hearer, vary; and the differences may be vital. Judgment may be confused instead of enlightened. Feeling may be agitated, not guided; reason deflected, not enlisted."

Every member of the Court knows from personal experience that the vibrant, vivid, graphic portrayal in a motion picture has an impact that the lecturing voice of a speech, the cold type of the written page, the still picture in a magazine does not. Add to that the setting in which the movie is viewed—the darkened theatre, the relaxed receptive mood, the complete concentration on the presentation, the company of a sizable or even vast audience, all simultaneously silently focusing on the screen. Add also the vast numbers which the motion pictures reach, "the wider and less selected" audiences (Mr. Justice Holmes in *Fox* v. *Washington*, 236 U. S. 273, 277), made up of men and women together, of teen age boys and girls together, of adolescent boys and girls together, and of children. This is set forth in fuller detail by those who know the subject best, The Motion Picture Producers in their Code (2 D, *et seq.)* quoted *supra*, pp. 25-27.

There we have the difference in "values," in potential evils, that is the reasonable basis for some control legislation and that requires the difference in the application of constitutional guaranties *(Kovacs* v. *Cooper, supra,* 336 U. S. 77, at pp. 96, 97).

Preventive measures and punishment for abuse of constitutional freedoms are alternative forms of regulation adopted as circumstances indicate. The form of regulation is within the State's discretion.

In common with the federal laws and other state and local laws as to motion pictures, the New York law is a preventive one, that is to say, inspection is made prior to exhibition.

As a matter of fact, the law did not so operate in appellant's case *(infra,* point III). "The Miracle" ran for

some weeks and the license was revoked thereafter *(supra,* "The Facts"). Thus, as to appellant and this particular motion picture, the exercise of control was not prior to exhibition.

Appellant urges that while it would be constitutional to punish abuses, it is not constitutional to take the preventive measure.

This Court has in its decisions recognized that such a rule would not reach the fundamental issue, which is always whether the competing interests of the individual and the community indicate that complete freedom of communication may in the particular case prevail. For, of course, punishment is equally as restrictive of that freedom as prevention. This Court, therefore, couples prevention *or* punishment; prevention *and* punishment *(Terminiello* v. *Chicago,* 337 U. S. 1, 4; *Associated Press* v. *United States,* 326 U. S. 1, 7; *Chaplinsky* v. *New Hampshire, supra,* 315 U. S. 568, 571) and does not permit punishment or does permit prevention as the situation requires (for example, *Giboney* v. *Empire Storage Co., supra,* 336 U. S. 490; *Hughes* v. *Superior Court, supra,* 339 U. S. 460; *Schenck* v. *United States,* 249 U. S. 47; *Chaplinsky* v. *New Hampshire, supra; Near* v. *Minnesota, supra,* 283 U. S. 697). The method of regulation is for the State to determine, as the cited decisions declare:

> "The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice" *(Hughes* v. *Superior Court, supra,* at p. 468).

The motion picture, as the Congress, the several states and numbers of cities have agreed *(supra),* compels the form of control to be prevention. Once the picture is shown, the evil has occurred. Motion pictures frequently

have brief runs, sometimes just a few days, and were the form of control to be punishment, the evil would have been completed before action could be taken. As Professor Chafee has stated, "the harm is done as soon as" the obscene talk or picture is communicated (*Free Speech in the United States, supra*, p. 150).

Moreover, a motion picture having one showing in a large theatre, such as Radio City Music Hall in New York, would have been viewed by several thousand persons; if it ran for just a day it would have been viewed by four or five times several thousand. If it is released at the same time in several large cities in the State, that number is compounded. It is reasons such as these which compel the form of regulation to be as to motion pictures that of prevention, rather than subsequent action.

As to the exhibitors of motion pictures, it works to their benefit that the approval or disapproval comes in advance (cf. Chafee, *Free Speech in the United States, supra*, p. 534).

Under the statutes in New York State, particularly the Penal Law, motion pictures are subjected to but one scrutiny. When they are licensed by the Education Department, they may be shown anywhere in this State.

Messrs. Ernst and Lindey tell the story as factual (in "The Censor Marches On," cited in appellant's Br., p. 22) that when the New York statute here involved was introduced in the Legislature, some of the producers on the west coast got together and decided to fight it. Expecting the cooperation of exhibitors, they sent an emissary east to organize the opposition. As the authors tell the story (p. 75):

"He was in for a surprise. The exhibitors shook their heads. They had no intention of fighting censorship, they said. On the contrary, they'd welcome it. There was a criminal statute in New York against obscene shows. Without censorship, exhibitors ran the risk of prosecution if they played a salacious picture. Censorship would place an official stamp of approval on all films, and would insure theater owners against criminal charges for indecency."

And that is precisely what has happened. By specific statute and decision in New York state, it is demonstrated how prior licensing benefits the motion picture exhibitor. Because it obtains, Section 1141 of the New York Penal Law, which makes it a misdemeanor to sell, distribute or exhibit obscene pictures and writings—including books, magazines and newspapers—specifically excludes motion pictures which have been licensed, viz.:

"This subdivision shall not apply to motion picture films licensed by the state department of education."

In connection with this very motion picture "The Miracle," prior to the revocation of its license by the Regents, the New York City Commissioner of Licenses suspended the license of the theatre in which it was being shown (upon the ground that the film was blasphemous). The New York Supreme Court held his action unauthorized, saying (*Burstyn, Inc.* v. *McCaffrey, supra*, 198 Misc. 884, 885):

"The right to determine whether a motion picture is indecent, immoral or sacrilegious is vested solely and exclusively in the Education Department of the State. Complete regulations for review and licensing are provided by statute (Education Law, §§ 120-132). This power negatives the existence of coequal powers in any municipal officer (*Hughes Tool Co.* v. *Fielding;* 188 Misc. 917, affd. 272 App. Div. 1048, affd. 297 N. Y. 1024), and a local law which purports to give such

municipal officer regulatory powers as to the content of films is unconstitutional and void (*Monroe Amusement Co.* v. *City of Rochester*, 190 Misc. 360).

> "* * * the Legislature forbade criminal prosecution for the exhibition of a licensed motion picture (Penal Law, § 1141). * * * This means that peace officers have duties in respect to films, for instance bringing to justice the exhibitor of an unlicensed film which offended against decency. But it is clear that they have no duties with respect to the content of films which have been licensed."

Appellant (Br., pp. 31, 38) is fearful of the possibilities of abuse in application of the statute and urges that such possibilities render it void. This Court will not strike down a statute in apprehension that on some far away day it will be perverted in application. There are few statutes which are not capable of abuse in application. This Court will not assume in advance that they will be misapplied (Mr. Justice Douglas in *Allen-Bradley Local* v. *Board*, 315 U. S. 740, 746; Mr. Justice Black in *United States* v. *Petrillo*, 332 U. S. 1, 11-12; Mr. Justice Frankfurter in *Niemotko* v. *Maryland, supra*, 340 U. S. at p. 289; *Cowley* v. *Christensen, supra*, 137 U. S. 86; Mr. Justice Holmes in *Fox* v. *Washington, supra*, 236 U. S. 273, 277). The presumption is otherwise.

In fact in the forty or more years that there have been laws (federal, state and local), regulating the exhibition of motion pictures, the Motion Picture Industry has—in what must have been fair freedom—thrived and grown, and, as appellant contends, improved its standards.

There is nothing before this Court which would indicate that its holding in the Mutual case was unwise.

There is nothing before the Court which would indicate any sound reason for reversal of its opinion. The New York motion picture law has been on the statute books of the State since 1921 (Chap. 715, L. 1921). Since that time the Division has examined approximately 57,000 films. It has only been in rare instances that its act in refusal to license has been challenged in the courts. The courts have sustained its decision so far in every instance. Thus, the Department of Education has obviously acted with extreme restraint. It has found it necessary most frequently to apply the statutory regulation not to films made in the United States, but to foreign films made under conceptions of decency not in accord with American standards, public opinion and policy.

In other words, the appellant can point to nothing by way of argument or fact which even suggests that the power or discretion under the New York Law has been abused. There have never been any complaints as to timing. The Division has bent over backwards to see to it that films are swiftly processed. There has been no criticism on the part of the general public from which the appellant herein can gain any comfort in any argument looking toward a reversal of the opinion of this Court.

The people of the State of New York, we think, believe that premised upon this Court's decision in 1915 in the *Mutual* cases, in examining and in licensing films and in eliminating those contravening the statute, the State and the Education Department have accomplished much in the public service to the State. There is nothing before the Court to the contrary.

Any theory that it would be better to eliminate preconsideration and permit local agencies through injunctions or, perhaps, prosecutions, to stop motion pictures if they violate some provisions of the penal laws (in respect to indecency or obscenity) establishes, in itself, a chaotic situation resulting in multitudinous lawsuits,—certainly not in the interest of the public, nor the industry.

II

To portray the sacrilegious in a motion picture is not an expression of the exhibitor's freedom of religion under the protection of the Constitution. On the contrary it is a violation of the public's freedom of religion.

To decline to license sacrilegious films is within the State's police power. It does not entail any participation in religious affairs.

The word "sacrilegious" has a well understood meaning and is as precise as a statute is required or could be practically.

Appellant's brief (Points III and IV; and pp. 9, 37) contends that the constitutional guaranty of freedom of religion gives motion picture exhibitors the unlimited right to lampoon and vilify all religion and any religion.

There could not be a grosser distortion of the most precious right guaranteed by our Constitution—the right to worship God, each according to his own belief; the right to follow one's own religious faith in an atmosphere of tolerance, respect and understanding.

James Madison explained to the Congress the meaning of the guaranty of religious freedom when it was being written into the First Amendment. As Mr. Justice Reed

in his dissenting opinion in *Murdock* v. *Pennsylvania, supra,* 319 U. S. 105, relates Madison's explanation appearing in the record of the Congress (319 U. S. at p. 125);

> "'no religion shall be established by law, nor shall the equal rights of conscience be infringed.' 1 Annals of Congress 729.
>
> "He said that he apprehended the meaning of the words on religion to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. *Id.*, 730."

Is lampooning religion in a motion picture being exhibited for profit, pursuit of that freedom?

The New York Court of Appeals viewed "The Miracle". The Court's opinion introduces the description of the film by saying: (R. 152; 303 N. Y. at pp. 256-7)

> "We have all viewed the film in question. The so-called exhibits, which are simply unsworn communications expressing personal opinions, are of little help to us. The principal basis for the charge of sacrilege is found in the picture itself, the personalities involved, the use of scriptural passages as a background for the portrayal of the characters, and their actions, together with other portions of the script and the title of the film itself. It is featured as a 'way of love'. At the very outset, we are given this definition: 'ardent affection, passionate attachment, men's adoration of God, sexual passion, gratification, devotion'."

We adopt the Court's description of "The Miracle" (R. 152-3, 303 N. Y. at p. 257):

> "While the film in question is called 'The Miracle', no miracle is shown; on the contrary, we have the picture of a demented peasant girl meeting a complete stranger whom she addresses as 'Saint Joseph'. At the very beginning of the script, reference is made to 'Jesus, Joseph, Mary'. 'Saint Joseph' first causes

her to become intoxicated. Scriptural passages referring to the Holy Sacrament (Luke 22:19), and to the nativity of Christ (Matthew 1:20), are freely employed immediately after she states she is not well. A blackout in the film, in its association with the story, compels the inference that sexual intercourse and conception ensue. 'Saint Joseph' abandons her immediately following the seduction, she is later found pregnant, and a mock religious procession is staged in her honor; she is 'crowned' with an old washbasin, is thrown out by her former lover, and the picture concludes with a realistic portrayal of her labor pains and the birth in a church courtyard of her child, whom she addresses as 'my blessed son', 'My holy son'."

The sacrilege of "The Miracle", as already noted, lies not only in that it "encroaches" upon the relationship of Christ, Mary and Jesus, a relationship held sacred by millions*, and upon the "Biblical presentation" of that relationship, but in that it "utterly destroys it, associating it, as the Regents found, 'with drunkenness, seduction, mockery and lewdness', and, in the language of the script itself, with 'passionate attachment-* * * sexual passion' and 'gratification', as a way of love" (R. 153, 303 N. Y. at p. 259).**

Appellant does not claim that either it or the producers or performers were expressing any religious beliefs contrary to those of the Christian faith in respect to the relationship of Christ, Mary and Joseph. Appellant does not claim that "The Miracle" was criticizing, as an expression of any one's religious views, that the Christian concept of that relationship was an erroneous belief. Appellant does not claim that "The Miracle" was proselytizing.

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* Cf. Mr. Justice Douglas in *U. S.* v. *Ballard*, 322 U. S. 78 at p. 87.

** The holding of the State Court that the motion picture is sacrilegious will be accepted "as binding" by this Court (*Cantwell* v. *Connecticut*, 310 U. S. 296. See also *Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568, 573-4.)

That would be the portrayal of religious dogma which the New York statute does not prevent. It prevents only the vilifying and reviling of the religious beliefs of any segment of the population, whatever segment and whatever religious persuasion may be involved, for the derivation of profits from the presentation of entertainments. In the words of Duncan, J., in the *Updegraph* v. *Commonwealth*, 11 Serg. & R. (Pa.) 394, 409, case, "by such blasphemous vilification" * * * "no one pretends to prove any supposed truths, detect any supposed error, or advance any sentiment whatever."

As an expression of one's own religious views and to win adherents to it, this Court has held speech and writing to be protected, even when they include extreme criticism of other religious beliefs. However such cases involved expression of religious belief by those who uttered them. None were burlesque of a religious belief for the sheer purpose of producing a motion picture that would make money at the box office. For example, in *Cantwell* v. *Connecticut, supra*, 310 U. S. 296 (App's. Br. p. 44) the phonograph record was exhibited to the persons accosted, not, as here, for amusement and entertainment for profit, but as an earnest attempt at religious persuasion and proselytization, as a means of conveying religious thought and opinion. In fact the Court's opinion pointed out that Cantwell's "deportment" was not "noisy, truculent, overbearing or offensive" (310 U. S. at p. 308).

In *Chaplinsky* v. *New Hampshire, supra*, 315 U. S. 568, Mr. Justice Murphy said:

> "We cannot conceive that cursing a public officer is the exercise of religion in any sense of the term" (p. 571).

So here it cannot be conceived that lampooning and ridiculing for profit the solemn and sacred religious tenets of those who believe in the Divinity of Christ and of the Virgin Birth is the exercise of religion. The Constitution of the State of New York and of the United States guarantees freedom of religion. It is wholly within the guarantee of religious freedom that the State prohibits that which seeks to destroy religion. Suppose there were a motion picture which depicts religion and those who believe in religion as fools, as insane, as immoral. Suppose that the picture was so cleverly presented that it lampoons those who attend church, those who hold dear religious beliefs. Suppose it caricatures the miracles of Christ, the tabernacles of the Jews, the mosques of the Mohammedans. In "The Miracle" the Virgin is crowned with a dishpan and flowers are flung at her in mock tribute. If one such picture is permissible, it could be multiplied and the motion pictures flooded with sacrilegious presentations with the ultimate effect of destroying religion through lampooning it, whether the producers so purposed or not. Is the State helpless to prevent that?

In the present case, we recall once again, that the Regents received quantities of mail from hundreds of people who felt that the picture was an affront, not to them personally but to all those of their religious belief who hold the concepts of the Divinity of Christ in sanctity. In coming to the conclusion which they did, the Regents stated:

> "In this country, where we enjoy the priceless heritage of religious freedom, the law recognizes that men and women of all faiths respect the religious beliefs held by others. The mockery or profaning of these beliefs that are sacred to any portion of our citizenship is abhorrent to the laws of this great State. To millions of our people the Bible has been held sacred and by them taught, read, studied and held in rever-

ence and respect. Generation after generation have been influenced by its teachings. This picture takes the concept so sacred to them set forth in both the Protestant and Catholic versions of the volume (St. Matthew, King James and Douay version, Chapter I, verses 18-25) and associates it with drunkenness, seduction, mockery and lewdness."

Of appellant's argument that freedom of religion is denied when a motion picture may be refused a license on the ground of sacrilege because one man's sacrilege is another man's dogma, and one may thus be prevented from propagating his own religious views by means of motion pictures, the Court of Appeals said that such argument was "specious when applied to motion pictures offered to the public for general exhibition as a form of entertainment * * * Religious presentation, as ordinarily understood, as well as other educational and scientific films, are exempt (Education Law Section 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or anti-religious sentiments he chooses through a proper use of the films" (R. 153-4, 303 N. Y. at p. 258).

Appellant carries its argument to the ridiculous (at pp. 37-38) when it proposes the possibility of refusing to license as sacrilegious motion pictures which depict practices which are contrary to some religious briefs. In fact, appellant projects there exactly what the New York law does not embrace and the constitutional propriety of what it does cover. Appellant cites as example burial of the dead, jewelry, tobacco and shaving, opposed or forbidden respectively by the Doukhobors, the United Pentecostal Church, The Church of Nazarene and Church of the House of David. Burial of the dead is depicted in many motion pictures,

About every woman on the screen wears jewelry, every other man on the screen smokes and many scenes of a man shaving are portrayed. Likewise there have been war pictures since movies began (a flux of them following the end of World War II), notwithstanding the Quakers' opposition to war. The classic "Yellow Jack" and other motion pictures have glorified the achievements of science notwithstanding Christian Science beliefs. There have in recent years been beautiful and delightful pictures portraying nuns and priests and their good work ("Come to the Stable," "Song of Bernadette," "Going My Way") notwithstanding the religious view of non-Catholics.

No one has thought of objecting to any of these, for none of them, of course, *ridicules* the religious beliefs or scruples of those who are not in agreement, and therefore are not sacrilegious as to those beliefs. The mere presentation in motion pictures of some fact which may be contrary to the religious precept of some particular group, of course, does not come within the meaning of the term "sacrilegious".

As further illustration, Jehovah's Witnesses object to saluting the Flag. They may not approve a picture showing school children saluting the Flag, but that does not make a scene wherein the Flag is saluted "sacrilegious" in their sight nor within the statute. Or the picture of a white cow might offend Hindus (Br., p. 38). But the mere representation of a white cow on the screen is not "sacrilegious." However, if there were a scene in which the Hindu conception of the sacredness of a white cow were lampooned and ridiculed the picture would then become sacrilegious.

As the exclusion of the obscene is in the State's police power, so is the exclusion of the sacrilegious.

"The statute now before us is clearly directed to the promotion of public welfare, morals, public peace and order * * * the traditionally recognized objects of the exercise of police power" (Court of Appeals opinion R. 155; 303 N. Y. at p. 259.)

The curb that it imposes upon the exhibition of sacrilegious motion pictures as well as obscene, indecent, immoral, inhuman and those that would tend to corrupt morals or incite to crime, is in the exercise of police power in the interests of public welfare, morals, public peace and order (*Carpenters Union* v. *Ritter's Cafe, supra,* 315 U. S. 722; *Crowley* v. *Christensen, supra,* 137 U. S. 86; *Drivers Union* v. *Meadowmoor Co., supra,* 312 U. S. 287; *Eureka Productions, Inc.* v. *Lehman, Governor, et al., supra,* 304 U. S. 541).

In this phase the Court of Appeals opinion continued (R. 155; 303 N. Y. at p. 259);

> "For this reason, any incidental benefit conferred upon religion is not sufficient to render this statute unconstitutional. There is here no regulation of religion, nor restriction thereof or other interference with religious beliefs except insofar as the picture itself does so, nor is there any establishment of religion or preference of religion or use of State property or funds in aid of religion. There is nothing more than a denial of the claimed right to hurl insults at the deepest and sincerest religious beliefs of others through the medium of a commercial entertainment spectacle."

A companion case to *Mutual Film Corp.* v. *Ohio* was *Mutual Film Corp.* v. *Hodges, supra,* 236 U. S. 248. This involved a statute of Kansas which required the denial of a license to a motion picture which was "sacrilegious" as well as to those which were obscene, indecent and immoral (236 U. S. at p. 257). This Court upheld the constitution-

ality of that statute too, holding that it was a valid exercise "of the police power of the states" and did not interfere with "liberty of opinion" (236 U. S. at p. 258). The Court of Appeals opinion in the instant case made reference to the *Hodges* case (R. 151; 303 N. Y. at p. 256).

As to whose religious freedom is invaded by ridiculing any religious faith in a movie the Court of Appeals said:

> "To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and, however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to 'the free exercise' of religion, guaranteed by the First Amendment." (R. 155; 303 N. Y. at p. 259)

The Court then added this most serious thought (R. 155-6; 303 N. Y. at pp. 259-260):

> "The offering of public gratuitous insult to recognized religious beliefs by means of commercial motion pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose. Insult, mockery, contempt and ridicule can be a deadly form of persecution—often far more so than more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action, and this State has recognized this principle, not only in the Education Law but in other respects as well (see, *e. g.*, Penal Law, art. 186; Civil Rights Law, art. 4). We are not aware that this power has ever been even impliedly denied to the States.
>
> "This nation is a land of religious freedom; it would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide amusement and for commercial gain."

Hughes v. *Superior Court, supra,* 339 U. S. 460, was decided upon the basis of the consideration thus voiced by Judge Froessel. The picketing disallowed in that case was to compel employment on the basis of race, and Mr. Justice Frankfurter said at pp. 464, 468:

> "In disallowing such picketing States may act under the belief that otherwise community tensions and conflicts would be exacerbated. The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of law. The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations. * * *
>
> "The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. * * *"

The glory and the triumph of Americanism is the multiple races and religions dwelling together peaceably under governmental principles of respect for every religious belief and religious practice. Nothing is so calculated to provoke hostility as ridicule and mockery; nothing so much as ridicule and mockery of race and religion. For man is most sensitive where his race and religion are concerned. History's record of religious wars and race riots attest to where racial and religious conflicts have led. This Court is completely cognizant of the extremes of discord that attacks upon race and religion can breed (*Hughes* v. *Superior Court, supra*; *Niemotko* v. *Maryland,* 340 U. S. 268, pp. 273 *et seq.* [concurring opinion of Mr. Justice Frankfurter]; *Kunz* v. *New York,* 340 U. S. 290, pp. 295 *et seq.* [dissenting opinion of Mr. Justice Jackson]; *Terminiello* v. *Chicago, supra,* 337 U. S. 1, pp. 13 *et seq.* [dissenting opinion of

Justice Jackson]; See also *Trinity Methodist Church, South* v. *Federal Radio Commission, supra,* (62 Fed. 2d, 850, 853, cert. den. 284 U. S. 685).

In the balancing of interests, it is submitted, freedom of business men to exhibit motion pictures for profit no matter how mocking of sacred religious beliefs, yields to the public interest in preserving the "Domestic Tranquility" for which our Constitution was ordained. The Preamble of the Constitution lists its purposes in the conjunctive; none is more significant than another. The importance of "Domestic Tranquility" is cognate with the importance of "liberty" (*Terminiello* v. *Chicago, supra,* at p. 34). To realize both in largest measure there must be accommodation between the limit to which personal liberty may be carried and the measures the State may take to insure domestic tranquility. The minor value to the community's well-being in the purpose for which a particular liberty is sought weighs heavily in determining to what length it may be carried and at what point the State may introduce the check of its police power (*Dennis* v. *United States, supra,* 341 U. S. 494; *Drivers Union* v. *Meadowmoor Co., supra,* 312 U. S. 287; *Niemotko* v. *Maryland, supra,* 340 U. S. 268; *Teamsters Union* v. *Hanke, supra,* 339 U. S. 470).

Free speech

> "is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if interference with free expression of ideas is not found to be the overbalancing consideration" (*Niemotko* v. *Maryland, supra,* 340 U. S. 268, 282).

In the present case, the phrases "free speech" and "free press" are not to be employed as a touchstone where the expression sought to be left free is the obscene, the indecent, and the sacrilegious. Surely such expression is not an

"overbalancing consideration," and the important interest of which this Court applying the Constitution is to be mindful, is the public and social order.

Cooley in *Constitutional Limitations* (p. 1223) has described the police power of a State as embracing "its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

The police power, Mr. Justice Holmes said in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 111, "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." "Many laws", he said (at p. 110) "which it would be vain to ask the Court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power." And see Chief Justice Hughes in *West Coast Hotel Co.* v. *Parrish, supra*, 300 U. S. 379, 391.

For an ordered society, the State under its police power may prohibit polygamy notwithstanding it is practiced as a matter of religious belief (*Reynolds* v. *United States*, 98

U. S. 145, 165, 166), and may prohibit the publication of "blasphemous or indecent articles, or other publications injurious to public morals," notwithstanding individual's freedom of speech and the press (*Robertson* v. *Baldwin*, *supra*, 165 U. S. 275, 281).

To prevent the burlesque of a religious belief in a motion picture does not "establish" that belief.

To appellant's argument that to determine that a motion picture is sacrilegious requires the making of a religious judgment and acceptance of religious dogma, and therefore requires a government official to pass on matters of religion (Br. point III), the Court of Appeals Opinion gave the complete and simple answer (at p. 258):

> "Nor is it true that the Regents must form religious judgments* in order to find that a film is sacrilegious. As hereinbefore indicated, there is nothing mysterious about the standard to be applied. It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures. As the court below said of the statute in question, 'All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom.' (278 App. Div. 253, 258.)
>
> "Although it is claimed that the law benefits all religions and thus breaches the wall of separation between Church and State, the fact that some benefit may incidentally accrue to religion is immaterial from the constitutional point of view if the statute has for its purpose a legitimate objective within the scope of the

* Appellant's contention (Br. pp. 33, 43) that judgment of what is sacrilegious must be subjective is exploded by the concrete fact that the Regents committee and the entire body, which concluded that "The Miracle" is sacriligious, is made up of individuals of various religious faiths.

police power of the State (*Everson* v. *Board of Educ.*, 330 U. S. 1; *Cochran* v. *Louisiana State Bd. of Educ.*, 281 U. S. 370; *Bradfield* v. *Roberts*, 175 U. S. 291; *People* v. *Friedman*, 302 N. Y. 75, appeal dismissed for want of substantial Federal question 341 U. S. 907)."

To restrain the ridiculing of religion or of any religious belief is not "aid" in a positive sense nor is it adopting or enforcing any religious belief. From the time the license for the motion picture "The Miracle" was revoked and by such revocation, neither the Christian concept nor specifically the Catholic concept of Christ and His relationship to Mary and Joseph, was compelled as "established" religion nor forced upon any one. Indeed to prevent the sacrilegious in a film is the very "neutrality" for which appellant argues (Br. p. 42). It puts into application the fundamental American constitutional principle that anyone's religious belief and practice shall not be destroyed by laughter—than which nothing is more destructive.

The language of the statute is as precise as the law requires that it be and as it can be practically.

Appellant (Br. point II) charges vagueness of the statute apparently involving in that charge all the grounds upon which a license can be denied. The stress is on the charge that "sacrilegious", the ground upon which "The Miracle" license was revoked, is vague of meaning.

First, it is to be recalled, that the requirement for precision in a statute is most seriously regarded in statutes imposing criminal penalties (*Boyce Motor Lines* v. *United States*, 342 U. S. 337; *Winters* v. *New York*, *supra*, 333 U. S. 507, 515), while the effect of the statute here is to withhold the license from the motion picture.

But at all times and in all cases, courts are completely realistic in the exactness they demand of words. Courts do

not determine the meaning of language by semantic dissection as appellant has done in its brief (Br. p. 35).

As this Court said in a decision just a week ago *(United States* v. *Hood,* March 31, 1952) effect is given to the "ordinary reading" of a statute; to its meaning "as a matter of ordinary English speech".

Recently also in the *Boyce Motor Lines* case *(supra)* (January 28, 1952) this Court said to the requirement of definiteness.

> "But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the lines. *Nash* v. *United States,* 229 U. S. 373, 377 (1913); *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502-503 (1925); *United States* v. *Petrillo,* 332 U. S. 1, 7-8 (1947)."

In *Kovacs* v. *Cooper, supra,* the contention was made that the words "loud and raucous" were vague, obscure and indefinite. Mr. Justice Reed replied cryptically that this contention merited "only a passing reference". He said (336 U. S. at p. 79):

> "While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

Such a broad and general phrase as "public interest, convenience and necessity" is held "as concrete" as the

factors involved permit and sufficiently definite to guide administrative action (*National Broadcasting Co.* v. *United States, supra,* 319 U. S. 190).

The words "obscene", "lewd", "indecent", "sacrilegious" are not words of art or science which require or are capable of precise definition (*Chaplinsky* v. *New Hampshire, supra,* 315 U. S. 568; *Rosen* v. *United States, supra,* 161 U. S. 29). They are words of "common speech" (*Eisner* v. *Macomber,* 252 U. S. 189, 207; see also *Irwin* v. *Gavit,* 268 U. S. 161, 168 [Mr. Justice Holmes]) which popularly convey clear enough meaning (See, Thayer, *Legal Control of the Press, supra,* p. 276).

Similarly, the word "sacrilegious" is a word of "common speech". It popularly conveys the meaning of irreverence of religious beliefs and precepts. Definitions may vary, but that is the *meaning* as the Court of Appeals said in this case (R. 151):

> "Dictionary, however, furnishes a clear definition therefore, were it necessary to seek one, as, e. g., 'the act of violating or profaning anything sacred' (Funk & Wagnall's New Standard Dictionary, 1937). There is no difficulty in recognizing the limits of the criterion thus established, and the courts have had no problem, either with the word 'sacrilegious' or with its synonym, 'profane'."

A sacrilegious motion picture is one that is irreverent of religious beliefs and precepts—one such as "The Miracle" which ridicules, mocks, burlesques or lampoons what Courts will take judicial notice is a solemn and sacred religious belief of at least a segment of our population (*United States* v. *Ballard, supra,* 322 U. S. 78, 87).

Speaking of an analogous term "blasphemy", Thayer, *Legal Control of the Press, supra,* says (pp. 287-288):

> "Blasphemy in a legal sense means words spoken or written which express a contempt for God or for things held sacred by mankind. In a broad sense, blasphemy may mean any irreverent declaration or profanity.
>
> * * *
>
> "Blasphemy does not mean that there cannot be a serious and honest criticism of Christian religion or of God, Jesus Christ, or the Virgin Mary, or that there cannot be a comparison of the ethics or values of different religious beliefs. To be actionable the blasphemous words must be truly irreverent and designed to bring Things or Persons Divine into contempt. * * * courts are wont to take judicial notice of the common religious hopes and beliefs."

There may well be borderline cases as to whether a particular motion picture is sacrilegious. There will be borderline cases in respect to many, many statutes as to whether particular conduct comes within the statute involved. But that does not condemn the statute. When and if a situation such as appellant conjures up at page 31 of its brief, arises, will be the time to resolve it (see *supra*, end of point I).

In *United States* v. *Hood, supra*, this Court (in a criminal case) held that the construction of the statute did not "offend the requirement of definiteness". "The picture of the unsuspecting influence merchant, steering a careful course between violation of the statute on the one hand" and evasion of it on the other, "entrapped by the dubieties of this statute" "is not one to commend itself to reason". To the same effect *Boyce Motor Lines* v. *United States, supra; United States* v. *Wurzbach*, 280 U. S. 396; *Rosen* v. *United States, supra*, 161 U. S. 29.

In the same way appellant's contention (pp. 34-36) that the distributor here could not have anticipated that the statute would be applied to a mockery of a religious con-

cept because the derivation of the word "sacrilegious" means to steal sacred objects and some dictionary definitions of the words are to the same effect, "does not commend itself to reason".

III

Appellant is without standing to contest the validity of the statute.

Until now we have met the issues tendered by appellant head-on. There remains the question whether those issues are properly before the Court.

Appellant applied for, obtained and demands the right to retain, a license for the exhibition of the picture in question. Contending that the statute is wholly void, it nevertheless demands the protection which the statute affords from criminal prosecution and from the consequences of violation of local theater licensing requirements. As stated above, Section 1141 of the New York Penal Law, which makes it a crime to exhibit obscene pictures, specifically excludes motion picture films which have been licensed by the State Department of Education. In addition, by virtue of the license which appellant obtained and seeks to retain, it was rendered immune from action under the theater licensing provisions of the City of New York and of any other municipality in the state having such theater licensing requirements (*Burstyn v. McCaffrey, supra*, 198 N. Y. Misc. 884, 885). Thus appellant is in the position of contesting the validity of the statute, the benefits of which it sought, obtained and seeks to retain. This it may not do.

Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288, 348;
Fahey v. Mallonee, 332 U. S. 245, 255.

In the Ashwander case, this Court said (p. 348):

> "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

The Court of Appeals recognized this rule of law in its opinion in the instant case and, while considering that it was a bar to an attack upon the constitutionality of the statute *in toto*, nevertheless proceeded to a disposition of appellant's arguments upon the merits (R. 156).

In addition, as we have already pointed out, there has in this case been no previous restraint—no prior censorship. Appellant, thus, is in no position to complain on that score, for it has not been injured by that provision of the statute. This Court will not, as it has said, "anticipate a question of constitutional law in advance of the necessity of deciding it". It will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied".

Ashwander v. *Tennessee Valley Authority, supra*, at pp. 346, 347.

Anti-Fascist Committee v. *McGrath*, 341 U. S. 123, at pp. 150-154.

APPENDIX B #1

TICKETS NOW ON SALE AT BOX-OFFICE
PALACE
BETTY HUTTON
APR. 12

NOW — AT YOUR FAVORITE NEIGHBORHOOD THEATRE
RKO
SKOURAS
ANOTHER BIG DOUBLE 'A' SHOW!
JANE RUSSELL
VICTOR MATURE
VINCENT PRICE
HOAGY CARMICHAEL
"THE LAS VEGAS STORY"
Plus 2nd Feature
An Ocean of Fun! Gobs and Gobs of laughs!
GROUCHO MARX
MARIE WILSON · WM. BENDIX
"A GIRL IN EVERY PORT"
Century
RANDFORCE
ALBEE
'VIVA ZAPATA'

TRANS-LUX
'SHOCKING!'
"A great film!"
"The picture made outside the rules! Entirely intriguing"

TONY'S TERRIFIC WITH TWO KINDS OF WOMEN
FLESH AND FURY
TONY CURTIS · JAN STERLING · MONA FREEMAN
LOEW'S STATE B'way & 45th St

LOEW'S
"QUO VADIS"
METROPOLITAN | JERSEY CITY | NEWARK STATE
3rd THRILLING WEEK! CONTINUOUS SHOWINGS!
QUO VADIS
Color By TECHNICOLOR

She Destroyed Those Who Dared To Love Her!
James MASON · Ava GARDNER
"PANDORA AND THE FLYING DUTCHMAN"
TECHNICOLOR
FOR MEN ONLY and Women too!
PAUL HENREID · Kathleen Hughes
PARADISE | VALENCIA

Action! Fury! Passion!
MUTINY
Technicolor
MARK STEVENS
ANGELA LANSBURY
LOVE! HATE! MURDER!
"The BIG NIGHT"
JOHN BARRYMORE, Jr.
TOM and JERRY
"DEATH of a SALESMAN"
HARLEM GLOBETROTTERS
CARY GRANT · BETSY DRAKE
"ROOM for ONE MORE"
IDA LUPINO · ROBT. RYAN
ON DANGEROUS GROUND

RADIO CITY MUSIC HALL
Showplace of the Nation · Rockefeller Center
"TOPS IN TOWN!" —Hale, News
"SPARKLING! A shower of fun and frolic!"
"FRESH and cheerful! Music, dance, color in riotous abundance!"
"HILARIOUS ... bountiful entertainment!"
"HAPPY entertainment ... something to sing about!"
"FINE fun ... you'll relish every morsel!"
"SUPERB! Delightfully amusing. Get to the Music Hall!"
SINGIN' IN THE RAIN
Color by Technicolor
GENE KELLY · DONALD O'CONNOR · DEBBIE REYNOLDS
JEAN HAGEN · MILLARD MITCHELL · CYD CHARISSE

THE MUSIC HALL'S GREAT EASTER STAGE SHOW
"Glory of Easter"
Beautiful, far-famed Cathedral pageant ... produced by Leonidoff ... with Gertrude Lockway, contralto, Choral Ensemble, Grand Organ and Symphony Orchestra directed by Raymond Paige
and
"SPRING SONG"
Celebrating Springtide frolics and finery ... settings by James Stewart Morcom ... the first American theatre appearance of the Andrea Dancers, Continental sensation ... Patricia Drylie, ballerina, and the Corps de Ballet in delightful divertissement, choreography by Florence Rogge ... the New York debut of Edward Ruhl, opera tenor find ... the famed Rockettes in glamorous precision by Russell Markert ... breath-taking novelty by Bela Kremo ... and a fascinating fashion show presenting latest Spring creations by leading designers.

When George Discovers American Women... YOU'LL Discover Laughter!
JOSÉ FERRER
A PERLBERG-SEATON production
ANYTHING CAN HAPPEN
Co-starring KIM HUNTER
He plays 'em mating calls that never miss!
He finds the way to an American girl's heart is via her stomach ... and lips!
He woos 'em and pursues 'em from the Statue of Liberty to the orange groves of Azusa!
with KURT KASZNAR
Produced by WILLIAM PERLBERG · Directed by GEORGE SEATON
Written for the screen by GEORGE SEATON and GEORGE OPPENHEIMER
A Paramount Picture
WORLD PREMIERE · BRANDT'S
TODAY 8:30 AM · MAYFAIR 7th Ave. & 47th St.

THE RIVER
ROXY
PREVIEW TODAY
20th CENTURY-FOX PROUDLY PRESENTS WITH ALL ITS MELODY ... ROMANCE AND HEART!
The JANE FROMAN STORY!
WITH A SONG IN MY HEART
Color by TECHNICOLOR
SUSAN HAYWARD · RORY CALHOUN · DAVID WAYNE · THELMA RITTER
BILL HAYES
DIVENA
LAMAR TROTTI · WALTER LANG

2 ACADEMY AWARD WINNERS
"The Lavender Hill Mob"
"Nature's Half Acre"

What is the infamous scandal about that girl and "My Son John"
Gala Premiere, Tues. April 8th, 8:30 P.M.
CAPITOL

"Highest Rating!"
MY 6 CONVICTS
Astor
"One of the Happiest Entertainments of the Year!"
JUDY HOLLIDAY
The Marrying Kind
Victoria

THE SHOW THAT'S THE RAVE OF THE TOWN!
On Screen!
In Person!
FRANK SINATRA
PARAMOUNT

"FUNNIEST PICTURE IN THE LAST TEN YEARS!"
Alec Guinness
THE MAN IN THE WHITE SUIT
SUTTON

encore
ACADEMY AWARD WINNER
Rasho-Mon
Last 4 Days
Les MISERABLES
THALIA
SAVOY
PARDON MY FRENCH
MARLON BRANDO
VIVA ZAPATA!

"Made with such mastery that the picture fascinates!" —Herald Trib.
"In the raw, realistic tradition... the most powerful and ruthless of the lot!" —Time Magazine
LUIS BUÑUEL'S
The Young and the Damned
An Oscar Dancigers Production
An Arthur Mayer-Edward Kingsley Release
TRANS-LUX 52nd at Lexington
Feature at: 12:00, 1:53, 3:46, 5:39, 7:32, 9:27, 11:22

60th T.S. ELIOT'S "Murder in the Cathedral"
72nd REX HARRISON in NOEL COWARD'S Blithe Spirit
85th "I WANT YOU"
COLONY "THE BROWNING VERSION" & "Pool of London"

HUMPHREY BOGART · KATHARINE HEPBURN
The AFRICAN QUEEN
Color by TECHNICOLOR
CAPITOL B'way & 51st
Leo McCarey's My Son John
HELEN HAYES · VAN HEFLIN
ROBERT WALKER
DEAN JAGGER
STARTS TUES.

Beacon
HELD OVER — 2ND BIG WEEK!
"HIGHEST RATING!"
5 FINGERS
JAMES MASON · DANIELLE DARRIEUX · MICHAEL RENNIE
Return of the Texan
DALE ROBERTSON · JOANNE DRU · WALTER BRENNAN
Yorktown | Dale | Stoddard | Murray Hill
"Browning Version"
"Pool of London"
VIVIEN LEIGH · STEWART GRANGER
"Caesar and Cleopatra"
"SEVENTH VEIL"
Midtown
EXCLUSIVE SHOWING!
FLESH AND BLOOD
Richard TODD · Glynis JOHNS
Howard KEEL
"THE HIGBOOT"

"DRAMATIC... IMPRESSIVE... TOUCHING!"
QUEEN ELIZABETH and PHILIP
THE ROYAL JOURNEY
GUILD 50TH
GiGi
BOND STREET

PLAZA
CARY GRANT · BETSY DRAKE
"ROOM FOR ONE MORE"
GREENWICH
SCHUYLER
CARLTON
55th ST.
THE BIG DAY (JOUR de FÊTE)
MYSTERY STREET
ACADEMY AWARD Winner
KON-TIKI
5th AVE
BRINGING UP BABY
Paramount
MARTIN · LEWIS · "Sailor Beware"
FLAMING FEATHER
TECHNICOLOR
CHILDREN of PARADISE
BEAUTY and the BEAST
IRVING PLACE
ASTOR
MR. LORD SAYS NO
SMALL BACK ROOM
LAST 9 DAYS!
"PASSION for LIFE"
NEVER TAKE NO for an answer!

Conclusion

Freedom of speech and the press has never protected or sanctioned the obscene, indecent, sacrilegious. Certainly, the Constitution, which purposes also to insure religious liberty, is not to be converted into a weapon for its destruction and a shield of protection to those who would revile all religion or some religion, in order to provide profit for the destroyers in pandering to the lowest tastes in amusement (Cf. *Hannegan* v. *Esquire, supra*, 327 U. S. at p. 158). We are, as this Court said in *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 465:

> "* * * a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

It is axiomatic that no single constitutional right is limitless. Constitutional rights are necessarily limited by each other. It is submitted that the New York statute, when it denies licenses for the exhibition of obscene, indecent, sacrilegious motion pictures properly expresses the natural balance between the right to present motion picture films for amusement and entertainment, at a profit, and the right of the public to enjoy the freedom of religion guaranteed by our Constitution.

The advances in science that have brought blessings in comfort, luxury and entertainment have also brought problems for and responsibilities of regulation that the simpler unmechanized days of yesteryear did not present. The automobile and airplane require prior licensing, the establishment of traffic rules and of airlanes, that were unnecessary in the day of the horse and buggy. The driver of the horse-drawn vehicle who left his horse untethered to run away or who recklessly charged into a crowd could be dealt with after the fact for his solo breach. So as to "mass com-

munications" the exhibition of motion pictures has brought the need for "traffic rules" so to speak that are unnecessary when the communication is that of one man.

"The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." (*Breard* v. *Alexandria*, 341 U. S. 622 (1951), p. 642.)

In any event, this appellant has no standing to challenge the constitutionality of the statute (*supra*, point III).

The order and judgment of the Court of Appeals should be affirmed.

Dated: April 14, 1952.

Respectfully submitted,

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APPENDIX A

Education Law of the State of New York
(Revised C. 820, L. 1947)

ARTICLE 3

Education Department

* * *

PART II

Motion Picture Division

§ 120. **Motion picture division continued; organization.** There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

§ 121. **Local offices and bureaus.** The regents may authorize the establishment and maintenance of officers and bureaus for the reception and examination of films and for the transaction of the business of the division in such places as efficiency, economy and the public interests require.

§ 122. **Licenses.** The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

§ 123. **Permits.** 1. "Current event" films. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or excerpts from the public press, may be exhibited without inspection and no permits or fees shall be required therefor.

§ 2. **Scientific and educational films.** Such director or, when authorized, such officer shall issue a permit for every motion picture film of a strictly scientific character intended for use by the learned professions, without examination thereof, provided that the owner thereof, either personally or by his duly authorized attorney or representative, shall file the prescribed application which shall include a sworn description of the film and a statement that the film is not to be exhibited at any private or public place of amusement.

3. Such director or, when so authorized, such officer may, in his discretion, without examination thereof, issue a permit for any motion picture film intended solely for educational, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof, either personally or by

his duly authorized attorney or representative, shall file the prescribed application, which shall include a sworn description of the film. No fee shall be charged for any such permit.

§ 124. **Review by regents.** An applicant for a license or permit, in case his application be denied by the director of the division or by the officer authorized to issue the same, shall have the right of review by the regents. The regents, however, by rule may provide that such reviews may be heard and determined by a committee of the regents, the commissioner of education, the deputy commissioner of education or an assistant commissioner of education. A determination upon such review refusing a license shall be reviewable by a proceeding under article seventy-eight of the civil practice act at the instance of the applicant.

§ 125. **Permits revocable.** Any permit issued as provided in part two of this article or as provided in chapter seven hundred fifteen of the laws of nineteen hundred twenty-one may be revoked by such director or officer authorized to issue the same five days after notice in writing is mailed to the applicant at the address named in the application. Thereafter any such film may be submitted to such director or authorized officer only in the manner provided for license.

§ 126. **Fees.** The director or authorized officer of such division shall collect from each applicant for a license or a permit, except as otherwise expressly provided in part two of this article, a fee of three dollars for each one thousand feet or fraction thereof of original film and two dollars for each additional copy thereof licensed or permitted by him. The revocation or cancellation of any license or permit issued shall not entitle the grantee thereof to the return

of any fee paid. All fees received by such director or authorized officer shall be paid monthly into the general fund of the treasury of the state of New York.

§ 127. **Applications.** No license or permit shall be issued for any film unless and until application therefor shall be made in writing in the form, manner and substance prescribed by the education department, and accompanied by the required fee. Such application shall immediately be given a serial number which shall by the producer, owner or applicant be made a permanent part of the principal title portion of the corresponding film and every copy thereof for which the permit or license is applied, in such style and substance as such department shall prescribe.

§ 128. **Licenses and permits void.** Any license or permit issued upon a false or misleading affidavit or application shall be wholly void *ab initio*. Any change or alteration in a film after license or permit, except the elimination of a part or except upon written direction of the director or authorized officer of such division, shall be a violation of this article and shall also make immediately void the license or permit therefor. A conviction for a crime committed by the exhibition or unlawful possession of any film in the state of New York shall *per se* revoke any outstanding license or permit for said film and such director or authorized officer shall cause notice thereof to be sent to the applicant or applicants.

§ 129. **Unlawful use or exhibition.** It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the

education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

§ 130. **Posters, banners, et cetera.** No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such a character that its exhibition would tend to corrupt morals or incite to crime. If such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition, it shall be sufficient ground for the revocation of any permit or license issued by the education department.

§ 131. **Penalty.** A violation of any provision of part two of this article shall be a misdemeanor.

§ 132. **Enforcement; rules and regulations.** The board of regents shall have authority to enforce the provisions and purposes of part two of this article; but this shall not be construed to relieve any state or local peace office in the state from the duty otherwise imposed of detecting and prosecuting violations of the laws of the state of New York. In carrying out and enforcing the purposes of part two of this article, the regents may make all needful rules and regulations.